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 15 ASSOCIATION

16 STATE OF CALIFORNIA
 17 NEW MOTOR VEHICLE BOARD

18 In the Matter of the Petition of
 19 CALIFORNIA NEW CAR DEALERS
 20 ASSOCIATION

21 Petitioner,

22 v.

23 VOLVO GROUP NORTH AMERICA LLC aka
 24 VOLVO CAR USA, LLC,

25 Respondent.

Petition No. P-460-19

**PETITIONER'S OPPOSITION TO
 RESPONDENT'S REQUEST FOR
 RECUSAL OF DEALER MEMBERS OF
 NEW MOTOR VEHICLE BOARD;
 DECLARATION OF BRIAN MAAS IN
 SUPPORT THEREOF**

1 **I. INTRODUCTION**

2 Petitioner, the California New Car Dealers Association (“CNCDA”), brings its petition as a
3 “person” pursuant to Vehicle Code (“VC”) Section 470 against Respondent Volvo Group North
4 America LLC, also known as Volvo Car USA, LLC (collectively, “Volvo”), in connection with
5 Volvo’s Care by Volvo “subscription” program. This is not a dispute between licensees, or between
6 a franchisor and a franchisee, and this is not a protest presented by a franchisee. CNCDA is
7 petitioning the New Motor Vehicle Board (“NMVB”) to order the DMV to investigate Volvo’s
8 violations of the Vehicle Code and initiate disciplinary proceedings against Volvo’s license.

9 In Volvo’s Request for Recusal of Dealer Members, Volvo asks that those members of the
10 NMVB who are dealers (“Dealer Members”) recuse themselves from participating in this
11 proceeding. Volvo’s request should be denied for three separate and independent reasons.

12 First, Volvo has no legal basis to support its request to the NMVB. Faced with the absence
13 of law, Volvo is forced to ask the NMVB to exceed its authority and **create new law** in order to
14 grant Volvo’s request. Alternatively, Volvo asks that the NMVB declare the relevant statute
15 unconstitutional. The NMVB has no power to either make new law or declare a statute
16 unconstitutional. It cannot and should not do so here. The plain language of VC Section 3050(c)
17 does not provide for the recusal of dealer NMVB members from hearing petitions brought by
18 associations. NMVB should adhere to the plain language of the statute.

19 Second, precedent requires the NMVB deny Volvo’s request. As discussed further below,
20 the NMVB identified this issue in an earlier petition brought by the CNCDA against Chrysler. The
21 NMVB agreed that the Dealer Members did not need to recuse themselves. As such, the NMVB is
22 required to follow the governing law, and its own precedent and hold similarly here.

23 Third, contrary to Volvo’s insinuations, there is no basis to assert that any of the Dealer
24 Members of the NMVB are biased. None of the Dealer Members is on the CNCDA board or was in
25 any way involved with the preparing of CNCDA’s petition or CNCDA’s decision to bring this
26 petition. As such, there is simply no basis for Volvo’s assertion.

27 For each of the above three reasons, the NMVB should deny Volvo’s request and permit the
28 Dealer Members of the NMVB to participate in the hearing on the CNCDA’s petition.

II. STATEMENT OF FACTS

On January 15, 2019, CNCDA submitted a petition to the NMVB alleging that Volvo is violating the Vehicle Code by the implementation of Volvo's Care by Volvo Subscription Program. CNCDA submitted its petition as a "person," because CNCDA is a trade association – not a licensee of the DMV. Petition, ¶ 1.

In addition to CNCDA's dealer members, CNCDA consists of accounting firms; advertising, marketing, and public relations firms; auto financing and credit banks and companies; compliance and consulting companies; energy efficiency companies; independent retailers and wholesalers; information technology companies; insurance service companies; law firms; printing companies; and other associate members. Attached Declaration of Brian Maas ("Maas Decl."), ¶ 2. A list of CNCDA's current associate members can be found at <https://www.cncda.org/about/associate-directory/>.

None of the NMVB members is an officer or director of CNCDA. Maas Decl., ¶ 3. None of the NMVB members has participated in any decision with CNCDA's executive team, Board of Directors, or legal counsel regarding the preparation or filing of CNCDA's petition. Maas Decl., ¶ 3. None of the NMVB members participated in the vote of CNCDA's Board of Directors authorizing the CNCDA to file and pursue its petition. Maas Decl., ¶ 3.

In its petition, CNCDA alleges that Volvo is violating the Vehicle Code through Care by Volvo, it's so-called "subscription model." Petition, ¶ 5. The CNCDA requests that the NMVB (1) direct the DMV to conduct an investigation of Volvo's conduct and report the results of the investigation in writing to the NMVB pursuant to VC Section 3050(c)(1); and, (2) order the DMV to exercise its authority and power to initiate disciplinary proceedings against the motor vehicle manufacturer license of Volvo pursuant to VC Section 3050(c)(3). Petition, ¶ 90. CNCDA is petitioning the full NMVB for this relief. Petition, ¶ 90.

On February 28, 2019, Volvo filed an affidavit by its counsel Colm A. Moran ("Moran Aff.") requesting that the Dealer Members of the NMVB recuse themselves from consideration of the CNCDA petition. Such recusal is unprecedented and lacks any basis in the law. Accordingly, it should be denied.

1 **III. THE NMVB SHOULD NOT CREATE NEW LAW OR FIND SECTION 3050(C)**
2 **UNCONSTITUTIONAL**

3 Volvo's request asks the NMVB to create new law. Section 3050(c) currently states that
4 "[a] member of the board who is a new motor vehicle dealer may not participate in, hear, comment,
5 advise other members upon, or decide any matter considered by the board pursuant to this
6 subdivision that involves a dispute between a franchisee and franchisor." (Emphasis added.)
7 Volvo, however, is appealing to the NMVB now to create a new requirement to Section 3050(c) that
8 Dealer Members must also recuse themselves in disputes between an association and a franchisor.
9 Even more aggressively, Volvo also suggests the NMVB should declare Section 3050
10 unconstitutional or refuse to enforce Section 3050 on the grounds that it is unconstitutional.

11 No administrative agency has such power. "It is fundamental that an administrative agency
12 may not usurp the legislative function." *City of San Joaquin v. State Bd. of Equalization*, 9 Cal.
13 App. 3d 365, 374 (1970). The NMVB does not have the power to create new laws, and it should not
14 do so here.

15 Section 3050(c)'s language is clear. The NMVB should look no further than the clear words
16 of the statute on its face. *See Mazda Motor of Am., Inc. v. New Motor Vehicle Bd.*, 110 Cal. App.
17 4th 1451, 1456 (2003) (interpreting Section 3050 in the context of a dealer-distributor dispute; "In
18 determining legislative intent and a statute's purposes, we look first to the statutory language, giving
19 significance to every word and phrase. When the language is clear, we look no further and enforce
20 the statute according to its terms.") (citation omitted). Section 3050(c) should be enforced
21 according to the plain language of the statute, which does not mention – let alone require – recusal
22 of Dealer Members when a petition is brought by an association against a manufacturer.

23 The Legislature could have included disputes between associations and franchisors in the
24 types of disputes that require recusal of Dealer Members. It did not do so. As Volvo acknowledges,
25 former VC Sections 3085-3085.10 (which are no longer in effect) provided for specific types of
26 protests to be brought by associations primarily owned by or comprised of new motor vehicle
27 dealers and that primarily represent the interest of dealers. *Moran Aff.*, ¶ 17. Former Subsection
28 3050(e), which authorized the NMVB to hear and decide these types of protests, prohibited Dealer

Members from participation in deciding protests filed by associations pursuant to former VC Sections 3085-3085.10, unless the parties stipulate otherwise. Yet the Legislature **did not** include similar language in 3050(c) regarding petitions by associations, even when amending Section 3050 to provide for the NMVB's jurisdiction over protests by associations. The NMVB cannot and should not create new law now, especially where the Legislature decided not to do so.

Volvo alternatively asks the NMVB to find that participation of the dealer NMVB members would violate Volvo's constitutional right to due process of law. Even if such a finding were correct (which it is not), such a finding is beyond the NMVB's power. Article III, Section 3.5 of the California Constitution provides that "[a]n administrative agency" such as the NMVB "has no power: (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional; (b) To declare a statute unconstitutional . . ."

In *Chevrolet*, the manufacturer sought "a declaration that the statutes prescribing the Board's membership were unconstitutional." *Chevrolet Motor Div. v. New Motor Vehicle Bd.*, 146 Cal. App. 3d 533, 539 (1983) ("*Chevrolet*"). The Court of Appeal held that "[t]he Board itself could not have granted this relief" because of the restrictions of Article III, Section 3.5 of the Constitution. *Id.*; see also *Mazda Motor of Am., Inc.*, 110 Cal. App. 4th at 1457 ("Where the Board's activities exceed its authorization, the Board violates the judicial powers clause of the California Constitution (Cal. Const., art. VI, § 1).").

The NMVB does not have the authority to declare Section 3050(c) unconstitutional – that power lies only with the courts and Volvo has not cited to any court opinion holding that NMVB members should recuse themselves from disputes between an association and franchisor, and the CNCDA is unaware of any such decision. Accordingly, the NMVB should resist Volvo's invitation to act unconstitutionally. The NMVB should not, and cannot, find that Section 3050(c) is unconstitutional.

IV. PRECEDENT REQUIRES THAT THE NMVB DOES NOT ASK ITS DEALER MEMBERS TO RECUSE THEMSELVES

Both the public and dealer members of the NMVB previously decided a petition submitted

1 by the CNCDA against a manufacturer. The CNCDA respectfully submits that the NMVB should
2 follow its own precedent here.

3 “A nonstatutory principle of administrative law requires an agency to act in a manner that is
4 consistent with its prior adjudicatory decisions unless it discloses and justifies a change in legal
5 interpretation or policy. This obligation is derived from a requirement that an agency engage in
6 reasoned decisionmaking.” Michael Asimow, et al., California Practice Guide: Administrative Law
7 ¶ 10:220 (Dec. 2018); *Silva v. Nelson* 31 Cal. App. 3d 136, 138, at 141-42 (1973) (reversing the
8 Superior Court’s decision, the Court of Appeal relied on the Unemployment Insurance Appeals
9 Board’s own precedent).

10 Here, there is clear precedent to permit the Dealer Members of the NMVB to participate in
11 the hearing of CNCDA’s petition. On March 21, 2011, the CNCDA submitted Petition No. P-458-
12 11 against Chrysler Group. Maas Decl., ¶ 4. The CNCDA requested that the NMVB provide relief
13 under VC Sections 3050(c)(1) and 3050(c)(3) by directing the DMV to conduct an investigation or
14 ordering the DMV to exercise its authority and power to initiate disciplinary proceedings against the
15 motor vehicle manufacturer license of Chrysler Group LLC. Maas Decl., ¶ 4 & Exh. 1. CNCDA’s
16 petition was heard and granted **by the full NMVB** on May 26, 2011. Maas Decl., ¶ 4 & Exh. 1.
17 The NMVB’s minutes specifically state that “[o]ral comments were presented before the Public **and**
18 **Dealer Members** of the Board because this petition **does not involve a franchisee** and a
19 franchisor.” Maas Decl., ¶ 4 & Exh. 1, at p. 4 (emphasis added). The same reasoning applies here,
20 and the result should be the same.

21 **V. VOLVO’S SUPPOSED LEGAL AUTHORITY DOES NOT APPLY HERE**

22 CNCDA’s action concerns a petition, filed by a trade association, requesting an investigation
23 of a manufacturer under VC Section 3050(c). Volvo’s entire argument rests on three cases, each of
24 which pertains to a protest, filed by a franchisee, based on a franchisor’s termination of the dealer’s
25 franchise under VC Sections 3050(d) and 3060, *et seq.* *Am. Motors Sales Corp. v. New Motor*
26 *Vehicle Bd.*, 69 Cal. App. 3d 983, 985 (1977); *Nissan Motor Corp. v. New Motor Vehicle Bd.*, 153
27 Cal. App. 3d 109, 111 (1984); *Chevrolet*, 146 Cal. App. 3d at 536 (collectively, the “Volvo Cases”).
28 The underlined terms represent key areas of difference between the present case and the Volvo

1 Cases that demonstrate why recusal of the dealer NMVB members is not appropriate in this case.
 2 Volvo omits to mention that none of the three cases it relies on involved a petition filed under
 3 Section 3050(c), and none fits within the language of Section 3050(c) calling for recusal in “a
 4 dispute between a franchisee and franchisor.”

5 First, it is undisputed that CNCDA is a trade association and not a franchisee. Moran Aff., ¶
 6 3; see VC § 331.1 (defining franchisee as “any person who, pursuant to a franchise, receives new
 7 motor vehicles . . . from the franchisor and who offers for sale or lease, or sells or leases the vehicles
 8 at retail or is granted the right to perform authorized warranty repairs and service, or the right to
 9 perform any combination of these activities”). Under the Vehicle Code, an association such as
 10 CNCDA is a “person.” VC § 470 (“‘Person’ includes a natural person, firm, copartnership,
 11 association, limited liability company, or corporation.”) (emphasis added). Therefore, CNCDA
 12 brings this dispute as a “person” according to the Vehicle Code. VC § 3050(c) provides that “[t]he
 13 Board shall . . . [c]onsider any matter concerning the activities or practices of any person . . . holding
 14 a license as a . . . manufacturer . . . submitted by any **person**.” VC § 3050(c) (emphasis added). The
 15 Volvo Cases, however, do not involve disputes brought by a “person,” but rather by a franchisee –
 16 and therefore, they are inapposite.

17 Second, CNCDA filed a petition – not a protest. Petitions may be submitted by “any
 18 person” concerning the activities or practices of any DMV licensee (or license applicant). VC
 19 § 3050(c). Protests, on the other hand, may only be presented by a licensee against another licensee
 20 concerning certain specified franchise disputes. VC §§ 3050(d) and 3060, *et seq.*; see *Tovas v. Am.*
 21 *Honda Motor Co.*, 57 Cal. App. 4th 506, 515 (1997) (protests concern “only certain disputes
 22 between franchisors and franchisees”). Critically, Dealer Members of the NMVB are prohibited
 23 from participation in deciding protests, unless the parties expressly stipulate otherwise. VC
 24 §§ 3050(d), 3066(d).

25 Here, CNCDA submitted a petition – not a protest. Under the Vehicle Code rules, all
 26 members of the NMVB may hear a petition unless it “involves a dispute between a franchisee and
 27 franchisor” – which is not the case here. VC § 3050(c).

28 Accordingly, the Volvo Cases are in apposite and inapplicable here.

1 **VI. VOLVO'S SUGGESTION THAT DEALER MEMBERS WHO ARE CNCDA**
2 **MEMBERS CANNOT BE FAIR AND IMPARTIAL LACKS MERIT**

3 In a last ditch attempt, Volvo speculates that some of the dealer NMVB members may be
4 associated with dealerships that are CNCDA members and that, as a result, they may have a conflict
5 of interest. Volvo lacks any basis for its claims.

6 Volvo attempts to ground its request for recusal in 13 California Code of Regulations
7 Section 551.1, which provides that a "board member shall voluntarily disqualify himself or herself
8 and withdraw from any hearing or deliberation in which he or she cannot accord a fair and impartial
9 hearing or consideration." Volvo asserts that the dealer NMVB members must recuse themselves
10 because "[i]t is likely that the dealer members of the Board, and/or the dealerships with which they
11 are associated, are current, past, and/or future members of CNCDA." Moran Aff., ¶ 24.

12 First, Volvo's argument regarding future membership in the CNCDA should be dismissed
13 out of hand: an alleged potential future conflict of interest is impossible to prove and too remote to
14 possibly require recusal.

15 Second, while Volvo argues that some of the NMVB's members may be current or past
16 CNCDA members, in the CNCDA's prior petition against Chrysler, two of the NMVB members
17 were permitted to participate in the proceedings – even after they disclosed that they were **board**
18 **members** of CNCDA – because they asserted that they could be impartial. Maas Decl., ¶ 4 & Exh.
19 1, at pp. 3-4. Here, no Dealer Members of the NMVB are CNCDA board members. Maas Decl., ¶
20 3. But even if they were (which they are not), the precedent set at the hearing on CNCDA's prior
21 petition demonstrates that, even as board members, they would be able to participate as long as they
22 remained fair and impartial.

23 Third, CNCDA's requested relief is not pecuniary relief, but rather requests that the NMVB
24 authorize the DMV to investigate Volvo's violations of the Vehicle Code and initiate disciplinary
25 proceedings against Volvo's license. Volvo's argument that dealer NMVB members who are also
26 CNCDA members "have a direct interest in the outcome of this case" (Moran Aff., ¶ 25) does not
27 hold water. Additionally, mere association with an organization petitioning the NMVB is not
28 enough to require recusal. *See Leland Stanford Junior Univ. v. Superior Court*, 173 Cal. App. 3d

403, 405–06 (1985) (a judge who was a Stanford alumnus and active in alumni affairs – including serving as president of an alumni group for several years – was not disqualified from judging a case involving Stanford University as a party litigant).

Finally, in order to be crystal clear that there is no conflict of interest, CNCDA confirms that no Dealer Members of the NMVB participated in CNCDA’s decision to file and prosecute the petition, and no members of the NMVB have participated in any decision with CNCDA’s executive team, board of directors, or legal counsel regarding the CNCDA’s petition. Maas Decl., ¶ 3. There is simply no basis to assert that the Dealer Members of the NMVB will not be fair and impartial.

VII. CONCLUSION

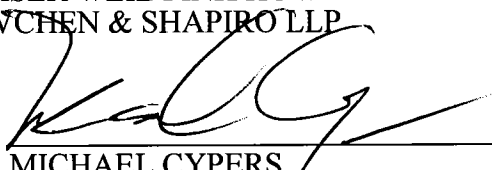
For the foregoing reasons, the CNCDA respectfully requests that the NMVB deny Volvo’s request that the Dealer Members of the NMVB recuse themselves from considering CNCDA’s petition. CNCDA’s petition should be heard by the full NMVB.

DATED: March 20, 2019

Respectfully submitted,

GLASER WEIL FINK HOWARD
AVCHEN & SHAPIRO LLP

By:


MICHAEL CYPERS
JULIE R. F. GERCHIK
CYNTHIA E. ORGAN
Attorneys for Petitioner
CALIFORNIA NEW CAR DEALERS
ASSOCIATION

DECLARATION OF BRIAN MAAS

I, BRIAN MAAS, declare and state as follows:

1. I am the President of Petitioner, the California New Car Dealers Association ("CNCDA"). I make this declaration in support of the CNCDA's Opposition to Respondent's Request for Recusal of Dealer Members of New Motor Vehicle Board. I have personal knowledge of the facts set forth herein, and if called upon to testify thereto, I could and would competently do so under oath.

2. In addition to CNCDA's dealer members, CNCDA consists of accounting firms; advertising, marketing, and public relations firms; auto financing and credit banks and companies; compliance and consulting companies; energy efficiency companies; independent retailers and wholesalers; information technology companies; insurance service companies; law firms; printing companies; and other associate members.

3. None of the New Motor Vehicle Board of California's ("NMVB") members is an officer of CNCDA or a member of its Board of Directors. None of the NMVB members participated in any decision with CNCDA's executive team, Board of Directors, or legal counsel regarding the preparation or filing of CNCDA's petition. None of the NMVB members participated in the vote of CNCDA's Board of Directors authorizing the CNCDA to file and pursue its petition.

4. On March 21, 2011, the CNCDA submitted Petition No. P-458-11 against Chrysler Group LLC. A true and correct copy of the minutes of the NMVB's May 26, 2011 meeting are attached hereto as Exhibit 1.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration is executed on March 19, 2019.

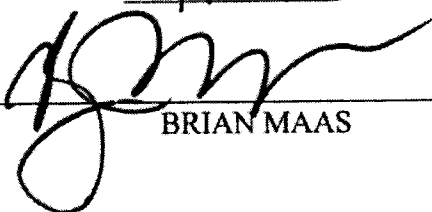

BRIAN MAAS

EXHIBIT 1

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Contact Person: Nicole Angulo
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STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD
MINUTES

The New Motor Vehicle Board ("Board") held a General meeting on May 26, 2011, at the Hilton Los Angeles Airport, Newport B Room, Los Angeles, California.

2. ROLL CALL

Ramon Alvarez C., President of the Board, called the meeting of the Board to order at 10:31 a.m.

Present:	Ramon Alvarez C.	William G. Brennan, Executive Director
	Ryan L. Brooks (left 3:22 p.m.)	Robin Parker, Senior Staff Counsel
	Peter Hoffman	Dana Winterrowd, Staff Counsel
	David C. Lizárraga	Jeffrey Schwarzschild, Deputy Attorney General
	Bismarck Obando	
	Victoria R. Pearson	
	Glenn E. Stevens	

Absent: Robert T. (Tom) Flesh
David W. Wilson

3. PLEDGE OF ALLEGIANCE

Ms. Pearson led the members and staff in the Pledge of Allegiance.

4. APPROVAL OF THE MINUTES FROM THE MARCH 29, 2011, GENERAL MEETING, AND MARCH 30, 2011, SPECIAL MEETING

Mr. Brooks moved to adopt the March 29, 2011, General Meeting, and March 30, 2011, Special Meeting minutes. Mr. Hoffman seconded the motion. Mr. Lizárraga did not vote on the minutes since he was not in attendance. The motion carried unanimously.

5. **ORAL PRESENTATION BEFORE THE PUBLIC MEMBERS OF THE BOARD**

Given these matters involve a dispute between a franchisee and a franchisor, Mr. Alvarez C. turned the meeting over to Glenn Stevens, Public Member and Vice President.

Mr. Stevens read the following statement "comments by the parties or by their counsel that are made regarding any proposed decision, proposed order, or proposed ruling must be limited to matters contained within the administrative record of the proceedings. No other information or argument will be considered by the Board." Furthermore, he indicated that since this is an adjudicative matter as described in Government Code section 11125.7(e), therefore members of the public may not comment on such matters.

- a. SHAYCO, INC., dba ONTARIO VOLKSWAGEN v. VOLKSWAGEN OF AMERICA, INC.
Protest No. PR-2265-10

Oral comments were presented before the Public Members of the Board. Michael J. Flanagan, Esq. and Gavin M. Hughes, Esq. of the Law Offices of Michael J. Flanagan represented Protestant. Allen Resnick, Esq. and Ryan Mauck, Esq., of Jeffer, Mangels, Butler & Mitchell LLP represented Respondent.

- b. HANLEES HILLTOP NISSAN v. NISSAN NORTH AMERICA, INC.
Protest No. PR-2291-11

Oral comments were presented before the Public Members of the Board. Michael M. Sieving, Esq. of the Law Offices of Michael M. Sieving represented Protestant. Ronnie McMahan, Esq. of Nelson Mullins Riley & Scarborough, LLP.

6. **CLOSED EXECUTIVE SESSION DELIBERATIONS**

Pursuant to Government Code section 11126(c)(3), Vehicle Code section 3008(a), and Title 13, California Code of Regulations, sections 581 and 588, the Board convenes in closed Executive Session to deliberate the decisions reached upon the evidence introduced in proceedings that were conducted in accordance with Chapter 5 (commencing with section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

- a. **CONSIDERATION OF PROPOSED DECISION**

SHAYCO, INC., dba ONTARIO VOLKSWAGEN v. VOLKSWAGEN OF AMERICA, INC.
Protest No. PR-2265-10

Consideration of the Administrative Law Judge's Proposed Decision, by the Public Members of the Board.

The Public Members of the Board deliberated in closed Executive Session. Mr. Brooks moved to remand this matter to Administrative Law Judge Marybelle Archibald to either take additional evidence or briefing on the good cause factor at Vehicle Code section

3063(b), which is the effect on the retail motor vehicle business and the consuming public in the relevant market area; specifically, the 19.4% of sales that Ontario Volkswagen is making in the Montclair RMA. Mr. Obando seconded the motion. The motion carried by a 3:1 vote with Mr. Stevens opposed.

b. **CONSIDERATION OF PROPOSED ORDER**

HANLEES HILLTOP NISSAN v. NISSAN NORTH AMERICA, INC.
Protest No. PR-2291-11

Consideration of the Administrative Law Judge's Proposed Order Granting Respondent's Motion to Dismiss Protest as Untimely, by the Public members of the Board.

The Public Members of the Board deliberated in closed Executive Session. Mr. Brooks moved to adopt the Administrative Law Judge's Proposed Order. Mr. Lizárraga seconded the motion. The motion carried unanimously.

7. **OPEN SESSION**

The Public Members returned to Open Session. Ms. Parker announced the decisions in Agenda Items 6(a) and 6(b).

Mr. Brooks indicated to the audience that Section 3065.1 was unclear; there needs to be clarity on the term "notice" and at what time the one year period begins.

Mr. Alvarez C. presided over the remainder of the meeting after a 20 minute break.

8. **CONSIDERATION OF PETITION REQUESTING THAT THE BOARD DIRECT DMV TO CONDUCT AN INVESTIGATION OF THE MATTERS CONTAINED THEREIN AND/OR ORDER DMV TO EXERCISE ITS AUTHORITY AND POWER TO INITIATE DISCIPLINARY PROCEEDINGS AGAINST RESPONDENT'S OCCUPATIONAL LICENSE PURSUANT TO VEHICLE CODE SECTION 3050(C)(1) AND (3)**

CALIFORNIA NEW CAR DEALERS ASSOCIATION v. CHRYSLER GROUP, a limited liability company
Petition No. P-458-11

Consideration of Petition requesting that the Board direct DMV to conduct an investigation of the matters contained therein and/or order DMV to exercise its authority and power to initiate disciplinary proceedings against Respondent's Occupational License, by the Public and Dealer Members of the Board.

Mr. Hoffman disclosed that he is on the Board of the California New Car Dealers Association ("CNCDA") and when the topic of filing this petition came up, he left the meeting. Also, Mr. Hoffman has spoken to Chrysler about a Fiat franchise. However, he indicated that he can judge the matter fairly and be reasonable, and has no financial interests. Ms. Pearson made the same disclosure about being a CNCDA Board Member but missed the meeting when the petition was discussed. Also, Ms. Pearson indicated that Maurice Claff recently took a

position in her organization. Ms. Pearson indicated that she can be impartial. Neither the CNCDA nor Chrysler objected to Mr. Hoffman's or Ms. Pearson's participation.

Oral comments were presented before the Public and Dealer Members of the Board because this petition does not involve a franchisee and franchisor. Peter K. Welch, Esq. and Jonathan Morrison, Esq. represented Petitioner. Gwen J. Young, Esq. of Wheeler Trigg O'Donnell LLP represented Respondent.

Public comment was presented by the following Chrysler dealers: David Ellis of Glendale Dodge and James Buerge, a Ford Mercury Chrysler/Jeep dealer. Girard Quinn, Market Investment Program and Minority Dealer Program, Chrysler, and John Tangeman, National Dealer Placement Manager, Chrysler, presented public comments as well.

The Public and Dealer members of the Board deliberated in Open Session. Mr. Stevens moved to grant the relief requested by Petitioner that the Board direct DMV to conduct an investigation of the allegations contained in the petition and order DMV to exercise any and all authority over Respondent's Occupational License and report back to the Board at the next meeting or at least provide a status report. Mr. Obando seconded the motion. The motion was not voted on.

Mr. Stevens moved to grant the relief requested by Petitioner and that this matter be ordered or referred to DMV for an investigation and the investigation be completed with the DMV reporting back to this Board by the next scheduled Board meeting. Mr. Hoffman seconded the motion.

Mr. Welch tried to amend the CNCDA's prayer for relief to limit it to the DMV investigation [Veh. Code § 3050(c)(1)]. Mr. Stevens declined to allow Mr. Welch to amend the prayer.

After further discussion, Mr. Alvarez C. called for a vote. The motion carried unanimously.

9. **ANNUAL UPDATE CONCERNING THE BOARD'S COMPLIANCE WITH THE 1996 PERFORMANCE AUDIT CONDUCTED BY BUSINESS, TRANSPORTATION & HOUSING AGENCY, AND THE RESULTANT CORRECTIVE ACTION PLAN - EXECUTIVE COMMITTEE**

The members were provided with a memorandum from Bill Brennan and Robin Parker updating the corrective action taken for each audit finding and a matrix providing the chronology for each. Ms. Parker indicated that the Board was in compliance with the Audit Findings and Corrective Action Plan and that there was nothing significant to report. Mr. Hoffman requested that this topic be made an exception report. Staff will continue to review the Board's compliance with the audit on an annual basis but only report to the Board if there is something of interest; a copy of the audit will be provided to new members.

10. **ANNUAL REVIEW AND CONSIDERATION OF BOARD DELEGATIONS IN COMPLIANCE WITH THE 1996 PERFORMANCE AUDIT CONDUCTED BY BUSINESS, TRANSPORTATION & HOUSING AGENCY - EXECUTIVE COMMITTEE**

The members were provided with a memorandum from Bill Brennan and Robin Parker updating the Board delegations that were originally adopted in 1997 in compliance with the

1996 Performance Audit conducted by Business, Transportation & Housing Agency. The delegations were thoroughly reviewed and revised at the November 20, 2008, General Meeting. Ms. Parker reported that there were no proposed revisions to the delegations that were most recently revised and adopted at the June 15, 2010, General Meeting. The only change in the delegations is to the introductory paragraph on page 1; the staff proposed no additional changes. In light of agenda item 9, this topic was also made an exception report; the staff will continue its annual review but only report suggested changes to the Board.

Mr. Stevens moved to adopt the Board delegations. Ms. Pearson seconded the motion. The motion carried unanimously.

Mr. Hoffman requested that the Board adopted Parliamentary Procedures be amended to reflect the Board's practice concerning how motions are made, seconded, and voted on. This will be on the September agenda.

11. **DISCUSSION AND CONSIDERATION OF WHO WILL ATTEND THE OUT-OF-STATE TRIPS FOR THE 1ST HALF OF FISCAL YEAR 2011/2012 THAT WERE PREVIOUSLY APPROVED BY THE BOARD - EXECUTIVE COMMITTEE**

The members were provided with a memorandum from Bill Brennan concerning who will attend out-of-state trips for the 1st half of fiscal year 2011-2012. As indicated in the memo, at the February 4, 2011, General Board Meeting, the Board Members approved the out-of-state travel plans for fiscal year 2011-2012. It was decided at the meeting that the Executive Committee would authorize individuals to attend. Mr. Brennan indicated that a new Executive Order limits travel and in light of that he suggested that the Board not attend the RVIA convention as it is not mission critical. Mr. Brennan proposed travel to the National Association of Motor Vehicle Boards and Commissions Fall Workshop in Reno, Nevada for two public Board members, Chief of Staff Dawn Kindel, and himself. The workshop will be held October 12 – 16, 2011.

Mr. Brooks moved to approve the proposed attendees for the out-of-state trips for the first half of the 2011-2012 fiscal year. Ms. Pearson seconded the motion. The motion carried unanimously.

12. **DISCUSSION AND CONSIDERATION OF WHETHER THE BOARD CAN "ADVERTISE" ITS CONSUMER MEDIATION PROGRAM AND THE IMPLICATIONS THEREIN ON THE 1996 PERFORMANCE AUDIT CONDUCTED BY BUSINESS, TRANSPORTATION & HOUSING AGENCY - EXECUTIVE COMMITTEE**

The members were provided with a memorandum from Bill Brennan, Dawn Kindel, and Jackie Grassinger concerning whether the Board can "advertise" its Consumer Mediation Program and the implications therein on the 1996 Performance Audit conducted by Business, Transportation & Housing Agency. Mr. Brennan indicated that the Board cannot "advertise" this program. However, there is a great opportunity for the Board to be more proactive with the different agencies within State government that the Board interacts with such as the Department of Consumer Affairs, the Department of Motor Vehicles, the California Highway Patrol, and the Arbitration Certification Program, and have a link to the Board on their websites.

Mr. Hoffman moved to adopt the staff recommendation. Mr. Brooks seconded the motion. The motion carried unanimously.

13. **DISCUSSION OF THE BOARD'S LEASE ON ITS CURRENT FACILITY AND POTENTIAL ALTERNATIVE LOCATIONS - ADMINISTRATION COMMITTEE**

The members were provided with a memorandum from Bill Brennan and Dawn Kindel concerning the Board's lease on its current facility and potential alternative locations. At the July 15, 2010, meeting, the Board asked staff to prepare a report on the current lease of office space and potential alternative locations for the Board's offices. The Board reviewed the report in December 2010 and asked for further information. In March 2011, John Hansen, Chief of Facilities at the DMV provided the Board with additional information on the Board's lease, the DMV's Master Plan, as well as information on the State's capital outlay process.

As indicated in the memo, the members of the Board asked Mr. Hansen to provide additional information to include State property available in downtown Sacramento, expiring State leases in downtown Sacramento, and the location that would be most convenient for staff.

Due to the recent Executive Order on travel, Mr. Hansen was unable to attend the meeting; however, he did provide information which he received from the Department of General Services Real Estate Division. Mr. Brennan reported that Mr. Hansen concluded that at this time there was not anything that met the Board's needs within its price range. Mr. Hansen will continue to monitor available properties and report back to the Board.

Mr. Brooks inquired about the proximity of the employees to the Board's offices. Mr. Brennan indicated that the staff preferred to stay in the midtown area.

14. **BOARD MEMBER EDUCATION CONCERNING CHANGES TO THE ADMINISTRATIVE PROCEDURE ACT, BAGLEY-KEENE OPEN MEETING ACT, POLITICAL REFORM ACT, AND PUBLIC RECORDS ACT - BOARD DEVELOPMENT COMMITTEE**

The members were provided with a memorandum from Bill Brennan, Robin Parker, and Dana Winterrowd along with summaries of the Administrative Procedure Act, Bagley-Keene Open Meeting Act, Political Reform Act and Public Records Act. A number of resource materials and the various acts were also provided on a CD. Ms. Parker indicated that there were no substantive changes. Mr. Winterrowd encouraged the members to review the Fair Political Practices Commission pamphlet in the CD of materials.

15. **CONSIDERATION OF NOMINEE FOR THE SOLON C. SOTERAS EMPLOYEE RECOGNITION AWARD RECIPIENT AS RECOMMENDED BY THE BOARD DEVELOPMENT COMMITTEE**

At the July 18, 2000, General Meeting, the members adopted an Employee Recognition Award Program to recognize staff for their accomplishments. The program was renamed the Solon C. Soteras Employee Recognition Award. The staff submitted employee nominations to the Board Development Committee, Ryan Brooks and Bismarck Obando, who ultimately recommended Robin Parker as the Employee Recognition Award recipient. Ms. Parker is Senior Staff Counsel in the legal department. Mr. Brooks moved to adopt the Committee's

recommendation. Mr. Hoffman seconded the motion. The motion carried unanimously.

16. **SEMI-ANNUAL DISCUSSION AND CONSIDERATION OF THE METHODS FOR DETERMINING BOARD FEES - FISCAL COMMITTEE**

The members were provided with a memorandum from Bill Brennan concerning the semi-annual discussion and consideration of the methods of determining Board fees. Mr. Brennan indicated that there is a methodology for the current fee schedule and back in February the Board recognized the need to reinstate the fees. The fees are not a tax. This is typically a semi-annual report; however, Mr. Hoffman indicated that an annual report is sufficient. In the future, if the Board recently acted on the fees then it is not necessary to repeat that discussion with this annual report.

17. **BOARD FINANCIAL CONDITION REPORT FOR THE 3RD QUARTER OF FISCAL YEAR 2010-2011 - FISCAL COMMITTEE**

The members were provided with a memorandum from Bill Brennan, Dawn Kindel, and Linda Lighter concerning the Board financial condition report for the 3rd quarter of fiscal year 2010-2011. Mr. Brennan indicated that the Board expended 54% of its appropriated budget through the third quarter. The Board expended only 34% of its budget for operating expenses. Mr. Brennan commented that the Board is being very frugal and conscientious. Lastly, Mr. Brennan indicated that the dealer fees are increasing for this fiscal year.

18. **DISCUSSION AND CONSIDERATION OF THE BOARD'S PROPOSED BUDGET FOR FISCAL YEAR 2011-2012 - FISCAL COMMITTEE**

The members were provided with a memorandum from Bill Brennan concerning the Board's proposed budget for the next fiscal year. Mr. Brennan indicated that the Board's proposed budget of \$1.6 million is comparable to the budget in 2005/2006. Mr. Hoffman moved to adopt the proposed budget. Mr. Stevens seconded the motion. The motion carried unanimously.

19. **STATUS REPORT ON PARTICIPANT AND AUDIENCE RESPONSES TO THE QUESTIONNAIRE CONCERNING THE BOARD'S INDUSTRY/ATTORNEY ROUNDTABLE - GOVERNMENT AND INDUSTRY AFFAIRS COMMITTEE**

The members were provided with a memorandum from Bill Brennan and Robin Parker concerning participant and audience responses to the Board's Industry/Attorney Roundtable. Ms. Parker reported that the feedback received from attendees and participants was favorable, and a number of good topics were suggested for the next event. The negative comments dealt with the room and that the PowerPoint presentations were difficult to read. Ms. Parker indicated who attended the event as follows: nine outside dealer law firms; 11 outside manufacturer law firms; and 10 manufacturers/distributors in addition to governmental entities, associations and speakers. Additional comments addressed separating the Attorney Roundtable from the Industry Roundtable. Ms. Parker indicated that the staff proposal for 2012 would be on the next agenda along with the bureaucratic steps that need to be taken.

20. **DISCUSSION CONCERNING PENDING LEGISLATION - POLICY AND PROCEDURE COMMITTEE**

- a. Legislation of Special Interest - none.
- b. Legislation of General Interest.
 - (1) Assembly Bill 1215 (Assembly Member Blumenfield).
 - (2) Senate Bill 642 (Senator Padilla).
- c. Pending Federal Legislation of General Interest.
 - (1) United States House of Representatives Bill 75 (U.S. Representative Jackson-Lee) - Automobile Dealers Fair Competition Act of 2011.

The members were provided with a memorandum from Bill Brennan and Robin Parker concerning pending legislation. Ms. Parker reported that there were no bills pending that directly affect the Board's enabling statute. However, there were three bills of general interest. Ms. Parker indicated that Assembly Bill 1215 was on the appropriations suspense file but that should be coming off soon and Senate Bill 642 passed the Senate. There has been no activity on the federal legislation.

21. **EXECUTIVE DIRECTOR'S REPORT**

- A. Administrative Matters.
- B. Case Management.
- C. Judicial Review.
- D. Notices Filed Pursuant to Vehicle Code sections 3060/3070 and 3062/3072.
- E. Other.

Mr. Brennan provided the members with a report on Administrative Matters that identified all pending projects, the Board staff and committee assigned, estimated completion dates, and status. Mr. Brennan indicated that he is involved in identifying and recruiting additional administrative law judges in light of ALJ Archibald's resignation.

Ms. Parker reported that since the members received their written report, there had been five new protest filed; two termination protests and three modification protests. She reported that the number of notices of termination are down considerably. In 2010, there were 164 notices; so far year-to-date there have been 15 notices. There have been 22 protests filed to date.

With regards to judicial matters, Ms. Parker reported that in the *Powerhouse* matter, she has been subpoenaed to testify on behalf of Yamaha.

22. **SELECTION OF BOARD MEETING DATES FOR THE REMAINDER OF 2011**

The members were provided with a memorandum from Bill Brennan concerning upcoming Board meeting dates. The members went off the record for this discussion. Ms. Parker announced that the following meetings were scheduled for the 2nd half of 2011:

- September 29, 2011, General Meeting, in Los Angeles (this date was subsequently changed to September 27);
- December 7, 2011, General Meeting, Sacramento.

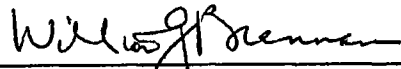
23. **PUBLIC COMMENT. (GOV. CODE § 11125.7)**

No additional public comment was presented.

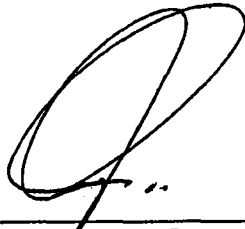
24. **ADJOURNMENT**

With no further business to discuss, the meeting was adjourned at approximately 3:50 p.m.

Submitted by



WILLIAM G. BRENNAN
Executive Director



APPROVED:

Ramon Alvarez C.
President
New Motor Vehicle Board

PROOF OF SERVICE**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

I am employed in the County of Los Angeles, State of California; I am over the age of 18 and not a party to the within action; my business address is 10250 Constellation Boulevard, 19th Floor, Los Angeles, California 90067.

On March 20, 2019, I served the foregoing document(s) described as **PETITIONER'S OPPOSITION TO RESPONDENT'S REQUEST FOR RECUSAL OF DEALER MEMBERS OF NEW MOTOR VEHICLE BOARD; DECLARATION OF BRIAN MAAS IN SUPPORT THEREOF** on the interested parties to this action by delivering a copy thereof addressed to each of said interested parties as follows:


- ☒ **(BY E-MAIL SERVICE)** I caused such document to be delivered electronically via e-mail to the e-mail address of the addressee(s) set forth as below:
- ☒ **(BY MAIL)** I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service. This correspondence shall be deposited with the United States Postal Service this same day in the ordinary course of business at our Firm's office address in Los Angeles, California. Service made pursuant to this paragraph, upon motion of a party served, shall be presumed invalid if the postal cancellation date of postage meter date on the envelope is more than one day after the date of deposit for mailing contained in this affidavit:

New Motor Vehicle Board
1507 – 21st Street, Suite 330
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nmvb@nmvb.ca.gov
Robin.Parker@nmvb.ca.gov

Colm A. Moran
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- ☒ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on March 20, 2019, at Los Angeles, California.


Deborah Muenich